

1 Laura R. Gerber (*Pro Hac Vice*)
2 KELLER ROHRBACK L.L.P.
3 1201 Third Avenue, Suite 3400
4 Seattle, Washington 98101
(206) 623-1900
lgerber@kellerrohrback.com

Attorney for Plaintiffs and the Putative Class
(Additional Counsel Listed on Signature Block)

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

NANCY PAPERNO, et al.,

Case No. 3:23-cv-05114-RFL

Plaintiffs,

v.

WHIRLPOOL CORPORATION,

Defendant.

**PLAINTIFFS' NOTICE OF MOTION
AND UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT AGREEMENT AND
CERTIFICATION OF SETTLEMENT
CLASS**

Date: Tue. December 10, 2024

Time: 10:00 a.m.

Judge: Hon. Rita F. Lin

Location: Courtroom 15, 18th Flr.

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STATEMENT OF THE ISSUES TO BE DECIDED

The issues to be decided on this Motion are:

1. Whether the proposed Settlement warrants preliminary approval;
 2. Whether to certify this action as a class action for purposes of settlement;
 3. Whether the Court should approve the notice plan, including the selection of Angeion as Settlement Administrator; and
 4. Whether the Court should schedule a Final Approval Fairness Hearing to determine whether the Settlement and Plaintiffs' forthcoming application for an award of attorneys' fees, costs, and Service Awards should be finally approved.

1 PLEASE TAKE NOTICE that on December 10, 2024, at 10:00 a.m., or as soon thereafter as
 2 counsel may be heard, before the Honorable Rita F. Lin, United States District Judge for the Northern
 3 District of California, at the United Sates Courthouse, 450 Golden Gate Avenue, San Francisco,
 4 California 94102, Plaintiffs will and hereby do move this Court for an order granting this Unopposed
 5 Motion for Preliminary Approval of Class Action Settlement.

6 Plaintiffs seek an order pursuant to Federal Rule of Civil Procedure 23(b)(3) certifying the
 7 Settlement Class; preliminarily approving the Settlement as fair, reasonable, and adequate; directing
 8 notice to the Settlement Class in the form and manner proposed by the Parties as set forth in the
 9 Settlement Agreement, the Admin. Decl., and all attached exhibits; appointing Angeion Group to serve
 10 as the Settlement Administrator; appointing Plaintiffs Nancy Paperno and Robert Gibbany as
 11 Settlement Class Representatives and the undersigned attorneys as Class Counsel; and setting a hearing
 12 date and schedule for final approval of the Settlement and consideration of Class Counsel's
 13 forthcoming motion for an award of attorneys' fees, costs, expenses, and service awards.

14 I. INTRODUCTION

15 The proposed Settlement Class Representatives¹ and Defendant Whirlpool Corporation have
 16 reached a settlement that reimburses Settlement Class Members—all persons who purchased (other
 17 than from resale) or otherwise obtained a Class Refrigerator within the United States and its territories
 18 from Whirlpool or its authorized resellers, subject to certain exclusions explained below—whose Class
 19 Refrigerators' experience a Frost Clog Issue.² For Frost Clog Issues arising within eight years after
 20 manufacture of the refrigerator, Settlement Class Members will be entitled to cash reimbursement of
 21 certain out-of-pocket expenses that they incurred when they repaired and/or replaced their refrigerators.
 22 This cash compensation is a great result at an early juncture in this case.

23 ¹ The capitalized terms in this Memorandum have the meanings set forth in the Class Action Settlement
 24 Agreement and Release (“Settlement Agreement” or “SA”). *See* Joint Declaration of Laura R. Gerber,
 25 James Bradley and Kenneth Behrman in Support of Plaintiffs’ Unopposed Motion for Preliminary
 26 Approval of Settlement and Certification of Settlement Class (“Joint Counsel Declaration” or “Joint
 27 Counsel Decl.”), attached hereto as Exhibit A, Ex. A.

28 ² The Complaint refers to this as an “RC Evaporator Defect,” *see* Class Action Complaint
 (“Complaint” or “Compl.”) ¶ 15, ECF No. 1. Because the phrase does not describe the problem
 consumers experience with their refrigerators—frost buildup in the refrigeration compartment and
 periodic cooling failures caused by frost buildup on the refrigeration compartment’s evaporator—the
 Parties hereafter refer to the problem as a “Frost Clog Issue.”

1 The benefits the Settlement provides are tailored to redress Class Members' injuries—incurred
 2 repair and/or replacement costs because their Class Refrigerators failed to properly cool their food. If
 3 the Settlement is approved, for each Paid Qualifying Repair, Settlement Class Members can recover:
 4 (1) in years one through three after manufacture, the Actual Cost of Repair up to a maximum of \$300
 5 per Paid Qualifying Repair; (2) in years four through six after manufacture, the Actual Cost of Repair
 6 up to a maximum of \$225 per Paid Qualifying Repair; and (3) in years seven or eight after manufacture,
 7 the Actual Cost of Repair up to a maximum of \$150 per Paid Qualifying Repair. For Paid Qualifying
 8 Replacements, Settlement Class Members will be entitled to a cash payment equivalent to a percentage
 9 of the original price of the Refrigerator as follows: (1) in years one through three after manufacture,
 10 75% of the original purchase price of the Refrigerator if Whirlpool's records show the Settlement Class
 11 Member contacted Whirlpool to request replacement before paying out-of-pocket for the same;
 12 otherwise, 50% of the Refrigerators' original purchase price; and (2) in years four through six after
 13 manufacture, 45% of the original purchase price of the Refrigerator if Whirlpool's records show that
 14 Settlement Class Members contacted Whirlpool to request replacement before paying out-of-pocket
 15 for the same; otherwise, 25% of the Refrigerators' original purchase price. Further, Settlement Class
 16 Members who experience a Frost Clog Issue after the Notice Date but within eight years after
 17 manufacture of their Refrigerator will be entitled to a credit toward repair of the Post-Notice Frost Clog
 18 Issue. These benefits are described more fully in the Settlement Agreement and below. At its core, the
 19 Settlement addresses the central allegation of this Action and achieves key relief sought by Plaintiffs
 20 Nancy Paperno and Robert Gibbany (collectively, "Plaintiffs").³

21 In light of the substantial monetary benefits conferred upon Settlement Class Members and the
 22 significant risks faced through continued litigation, the Settlement terms are "fair, reasonable, and
 23 adequate," as required by Federal Rule of Civil Procedure 23(e)(2). As such, Plaintiffs request the
 24 Court preliminarily approve the Settlement, appoint Class Counsel and the Settlement Class
 25
 26
 27

28 ³ While Whirlpool denies Plaintiffs' allegations, it has agreed to the Settlement Agreement and does not
 oppose this Motion.

1 Representatives, authorize providing notice to the Settlement Class, and set a hearing to consider final
 2 approval of the Settlement.⁴

3 II. BACKGROUND

4 A. A Brief Summary of the Lawsuit

5 The refrigerators at issue are three-door, French-door refrigerators manufactured by Whirlpool
 6 and sold under various brand names that employ a dual-evaporator system. Evaporators cool the
 7 refrigerator and freezer compartments. In performing this role, frost and ice sometimes form on the
 8 evaporator coil. Eventually, excessive frost or ice formation on the evaporator restricts air flow and
 9 causes cooling failures. To combat this issue, defrost heaters may accompany evaporators to
 10 automatically heat up and melt accumulated frost and ice. These refrigerators lack a defrost heater for
 11 the refrigeration compartment's evaporator. Plaintiffs allege these refrigerator models were prone to a
 12 failure of the defrost heating system in the refrigerator's dual evaporator cooling system that causes a
 13 buildup of frost and ice in the refrigeration compartment on or around the evaporator, which, in turn,
 14 affects the refrigerator's ability to cool food properly (the "Frost Clog Issue"). As a result, consumers
 15 lose the use of their refrigerator and must spend time and money having their refrigerator serviced.

16 Beginning in May 2022, Plaintiffs' Counsel began investigating the Frost Clog Issue that
 17 consumers were confronting with various Whirlpool refrigerators. Joint Counsel Decl. ¶ 8. It soon
 18 became apparent that the issue arose repeatedly in French door refrigerators with a dual evaporator
 19 cooling system which were designed, manufactured, distributed, marketed and/or sold by Whirlpool
 20 under several brand names, including Whirlpool, KitchenAid, JennAir, and Maytag. *Id.* For over a year,
 21 Plaintiffs' Counsel conducted a thorough pre-filing investigation into the Frost Clog Issue impacting
 22 Whirlpool refrigerators. *Id.* ¶ 9. Plaintiffs' Counsel reviewed publicly available information, including

23 ⁴ In support of this Motion, Plaintiffs submit the following: (1) Joint Counsel Declaration (the Joint
 24 Counsel Declaration includes: the Settlement Agreement, Ex. A, and all exhibits attached thereto,
 25 including the Claim Forms, List of Refrigerators; Long-Form Notice; Technical Service Pointer,
 26 Publication Notice; and Summary Notice, Ex. A at Exs. 1–6, respectively; the Comparable Outcomes
 27 Chart, Ex. B; Résumé of Keller Rohrback L.L.P., Ex. C; Résumé of Rogers, Patrick, Westbrook &
 28 Brickman, LLC, Ex. D; Résumé of Kenneth Behrman, Ex. E; and [Proposed] Order granting final
 approval of the Settlement, Ex. F); (2) Declaration of Nancy Paperno ("Paterno Decl."); (3)
 Declaration of Robert Gibbany ("Gibbany Decl."); (4) Declaration of Steven Weisbrot on behalf of
 the proposed Settlement Administrator ("Admin. Decl."); and (5) Declaration of Frank Bernatowicz
 ("Bernatowicz Decl."), and all exhibits.

1 refrigerator manuals, consumer complaints on various websites dating to as early as 2013, and three
 2 technical service pointers (“TSPs”) Whirlpool developed and issued to its authorized service providers
 3 containing several troubleshooting steps to address frost or ice forming on the front area of the
 4 refrigeration compartment. *Id.* They also consulted with refrigerator experts to determine the likely
 5 cause of the Frost Clog Issue, as well as speaking to numerous consumers who experienced the Frost
 6 Clog Issue with their refrigerators. *Id.* Plaintiffs’ Counsel also investigated legal claims associated with
 7 the factual allegations and Whirlpool’s potential defenses to any action. *Id.*

8 After being retained by Plaintiffs in April of 2023, Plaintiffs’ Counsel drafted and finalized the
 9 Class Action Complaint. *Id.* ¶ 10. On May 16, 2023, and June 7, 2023, Plaintiffs’ Counsel sent a pre-
 10 filing demand to Whirlpool and attached a copy of the draft Class Action Complaint. *Id.* After
 11 Whirlpool received the pre-filing demand, the Parties conferred telephonically, and Whirlpool
 12 expressed a desire to conduct a full inspection of Plaintiffs’ refrigerator, and the inspection occurred
 13 on August 11, 2023, at Plaintiffs’ home in Livermore, California, with counsel for Whirlpool, a service
 14 tech, and an expert for the defense conducting the inspection. *Id.* ¶ 11.

15 Following the inspection of Plaintiffs’ refrigerator, Whirlpool offered to compensate Plaintiffs
 16 for a replacement unit and related costs, but refused to discuss a class-wide resolution to resolve defects
 17 in other affected refrigerators. *Id.* ¶ 12. On August 23, 2023, Plaintiffs’ Counsel sent a follow-up letter
 18 to request confirmation as to whether Whirlpool would resolve, correct, repair, replace, or otherwise
 19 rectify the Frost Clog Issue in its refrigerators on a class-wide basis. *Id.* Whirlpool ultimately indicated
 20 it was not willing to provide class-wide relief. *Id.*

21 On October 5, 2023, Plaintiffs filed their Complaint and alleged four claims against Whirlpool:
 22 (1) breach of implied warranty under the Song-Beverly Consumer Warranty Act; (2) breach of implied
 23 warranty under the California Commercial Code and California common law; (3) violation of
 24 California’s Consumers Legal Remedies Act (“CLRA”); and (4) violation of California’s Unfair
 25 Competition Law (“UCL”). *Id.* (citing Compl. ¶¶ 96–170). The Complaint identified 24 refrigerator
 26 models that Whirlpool designed, manufactured, distributed, and/or sold. *Id.* (citing Compl. ¶ 2). Among
 27 the 24 refrigerator models, there are three-door, four-door, and five-door models. *Id.*
 28

1 On December 5, 2023, Whirlpool moved to dismiss each of Plaintiffs' claims. *See* ECF No. 30.

2 On March 13, 2024, the Court denied Whirlpool's motion in its entirety. *See* ECF No. 49.

3 **B. A Summary of the Mediation Efforts and Agreement to Settle.**

4 Starting in May 2024, Plaintiffs and Whirlpool scheduled a mediation for June 19, 2024,
 5 overseen by Hunter R. Hughes III, Esq. Joint Counsel Decl. ¶ 14. Before the mediation, the Parties
 6 exchanged informal discovery, including Whirlpool's repair claims data for the 3-, 4-, and 5-door
 7 models, which they each analyzed in connection with settlement discussions. *Id.* Plaintiffs' expert's
 8 analysis indicated a repair rate as high as 22.5% for the 3-door models—a high range according to
 9 Plaintiffs' expert. *Id.* The 4- and 5-door models did not have the same elevated repair rate. *Id.* Based
 10 on the data and the different overall architecture of the 3-door models, and because Plaintiffs own a 3-
 11 door model, the Parties were willing to resolve the Action only on behalf of purchasers of 3-door model
 12 refrigerators. *Id.* ¶ 16.

13 The arm's length mediation was productive but did not result in a settlement. *Id.* ¶ 15. Because
 14 the parties had progressed toward resolution, the Parties requested that the Court extend fact and expert
 15 discovery deadlines so settlement negotiations could be brought to a conclusion before resuming
 16 additional fact discovery. With Mr. Hughes' help, the Parties continued working through the summer
 17 of 2024 on potential settlement terms. In the weeks that followed, after considerable efforts to negotiate
 18 in good faith to reach a settlement, the Parties reached an impasse. On August 9, 2024, Mr. Hughes
 19 presented a mediator's proposal. On August 12, 2024, all Parties accepted the mediator's proposal,
 20 reaching agreement in principle to resolve this Action. *Id.* On August 13, 2024, the Parties notified the
 21 Court that the mediation efforts had resulted in a class-wide settlement of the Plaintiffs' claims. *Id.*

22 The Parties then turned to documenting the agreement set forth in the Settlement Agreement.
 23 *Id.* ¶¶ 17–22. As a condition of the Settlement, the Parties agreed to resolve only claims brought by
 24 three-door model refrigerator owners. *See* SA, Ex. 2 (Class Refrigerators covered by Settlement). As a
 25 further condition of the Settlement, the Settlement Class Representatives, on behalf of the proposed
 26 Settlement Class, agreed to release their claims and all potential claims that could have been brought
 27 based on the identical factual predicate as those alleged in the Complaint. *Id.* ¶ 16. Because the claims
 28

1 of those who purchased four-door and five-door model refrigerators are not being settled, the claims of
 2 those consumers are not being released in the Settlement. *Id.*

3 III. SETTLEMENT TERMS

4 A. Settlement Class Definition and Estimated Settlement Class Size.

5 The Settlement Class includes: “all persons who purchased (other than from resale) or
 6 [acquired as part of the purchase or remodel of a home or received as a gift from a donor meeting those
 7 requirements] a Class Refrigerator within the United States and its territories from Defendant or its
 8 authorized resellers. Excluded from the Settlement Class are (i) officers, directors, and employees of
 9 Whirlpool or its parents, subsidiaries, or affiliates, (ii) attorneys appearing in this case and their
 10 household members, (iii) insurers of Settlement Class Members, (iv) subrogees or all entities claiming
 11 to be subrogated to the rights of a Class Refrigerator purchaser, a Class Refrigerator owner, or a
 12 Settlement Class Member, (v) persons who acquired an other-than-new Class Refrigerator, (vi) issuers
 13 or providers of extended warranties or service contracts for Class Refrigerators, and (vii) persons who
 14 timely and validly exercise their right to be removed from the Settlement class, as described below.”
 15 SA at I.KK; *see also id.* at IV.A.1.

16 Material differences exist between the Settlement Class and the Class proposed in the
 17 Complaint. As noted above, the Class proposed in the Complaint included consumers who own 3-door,
 18 4-door, or 5-door refrigerators—a total of 24 models. By contrast, the Settlement provides relief for
 19 consumers who own 3-door models. *See SA, Ex. 2.* There are 14 Whirlpool-manufactured 3-door
 20 French door refrigerators covered by the Settlement (“Class Refrigerators”):

Class Refrigerator Model Number	KFIS29BB** ⁵ ; KFIS29PBM**; KFIV29PCM**; KRFF507E**; KRFF707E**; MFT2776DEE**; MFT2776FEZ**; MFT2778EE**; MFT2976AE**; MFT2977AE**; WRF757SDE**; WRF767SDEM**; WRF989SDA**; WRF990SLA**
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24 Two further differences exist between the Settlement Class and the Class proposed in the Complaint:
 25 (1) the Settlement Class includes all persons who purchased a Class Refrigerator within the United
 26 States and its territories, whereas the proposed Class included only persons who purchased a Class
 27

28 ⁵ As above, the ** symbol denotes a wildcard for color and engineering version of the model.

1 Refrigerator within the State of California; and (2) the Settlement Class excludes persons not excluded
 2 in the Complaint's Class. *Compare* SA at I.KK (defining Settlement Class), *with* Compl. ¶ 86.⁶

3 Based on discovery and analysis, including Whirlpool's representations, the Parties estimate
 4 the Settlement Class consists of approximately 354,000 class members. Joint Counsel Decl. ¶ 18.

5 **B. Benefits to Settlement Class Members.**

6 The Settlement Agreement provides that for any Settlement Class Member who has
 7 experienced, and/or will experience in the future, one or more Frost Clog Issues within eight years after
 8 manufacture⁷ of a Class Refrigerator, Whirlpool will reimburse or credit the Settlement Class Member
 9 for out-of-pocket expenses incurred to repair each Frost Clog Issue as follows: (1) in years one through
 10 three after manufacture, the Actual Cost of Repair up to a maximum of \$300 per Paid Qualifying
 11 Repair; (2) in years four through six after manufacture, the Actual Cost of Repair up to a maximum of
 12 \$225 per Paid Qualifying Repair; and (3) in years seven or eight after manufacture, the Actual Cost of
 13 Repair up to a maximum of \$150 per Paid Qualifying Repair. SA at IV.A–B. Class Members who
 14 previously received compensation from Whirlpool for a Frost Clog Issue will have such reimbursement
 15 or credit reduced by the cash-equivalent amount of such compensation. SA at IV.C.

16 In addition, the Settlement Agreement provides that for any Settlement Class Member who has
 17 experienced two or more Frost Clog Issues within six years after manufacture of a Class Refrigerator
 18 and then replaced that refrigerator, Whirlpool will reimburse a percentage of the Settlement Class
 19 Member's original purchase price of the Class Refrigerator as follows: (1) in years one through three
 20 after manufacture, 75% of the original purchase price of the Refrigerator if Whirlpool's records show
 21 the Settlement Class Member contacted Whirlpool to request replacement before paying out-of-pocket
 22 for the same; otherwise, 50% of the Refrigerators' original purchase price; and (2) in years four through
 23 six after manufacture, 45% of the original purchase price of the Refrigerator if Whirlpool's records

24
 25 ⁶ Plaintiffs defined the Class as "all persons who purchased, other than from resale, a Class Refrigerator
 within the State of California from Defendant or its authorized retailers." Compl. ¶ 86.

26
 27 ⁷ For ease of administration, entitlement to relief is based on the date of manufacture. However, any
 Settlement Class Member whose purchase date is later than the date of manufacture, if such
 difference would affect entitlement to relief, may provide documentary proof showing their purchase
 date. Class Members who provide sufficient documentary proof of their purchase date shall have their
 settlement benefit eligibility calculated according to their documented purchase or delivery date,
 whichever is later. SA at IV.A.2.f. All references to date of manufacture are subject to this provision.

1 show the Settlement Class Member contacted Whirlpool to request replacement before paying out-of-
 2 pocket for the same; otherwise, 25% of the Refrigerators' original purchase price. SA at IV.A.3.b. Class
 3 Members who previously received from Whirlpool a full refund for or free exchange of their Class
 4 Refrigerator will not be entitled to compensation (other than for any repair of a Frost Clog Issue related
 5 to a Class Refrigerator as outlined above). SA at IV.D.

6 Finally, as part of the Settlement Agreement, Whirlpool will pay for notice and administration
 7 of the Class Settlement, which the Angeion Group projects to be around \$200,000. SA at V.B; *see also*
 8 Admin. Decl. at ¶ 53.

9 The Settlement is valuable. By agreeing to pay for repairs of Frost Clog Issues that occur within
 10 eight years after manufacture of the Class Refrigerators, Whirlpool is essentially agreeing to an
 11 extended service plan for the entire Settlement Class to repair Frost Clog Issues for an additional seven
 12 years beyond the Class Refrigerators' original one-year warranties. Bernatowicz Decl. ¶¶ 12–14. One
 13 way to value the Settlement is to look at what such a service plan would cost on the open market.
 14 Plaintiffs' expert has valued this extended service plan at \$153.08 per Class Refrigerator, representing
 15 an appropriate portion of the market cost of a full seven-year extended service plan. *Id.* at ¶ 15.
 16 Plaintiffs' expert valued the extended service plan for the class at \$54.1 million. *Id.* at ¶¶ 16–19.

17 Plaintiffs' expert also estimated the maximum amount Whirlpool will potentially pay out for
 18 repairs and/or replacements of the Class Refrigerators under the Settlement. As stated above, Plaintiff's
 19 expert reviewed the repair data for the 3-door model refrigerators and estimated a repair rate due to
 20 Frost Clog Issues of up to 22.5%. *Id.* at ¶ 23. Plaintiffs' expert determined the distribution of Frost Clog
 21 repairs by year and calculated the maximum repair benefits by year based on the estimated repair rate
 22 range and the Settlement Agreement's terms. *Id.* at ¶¶ 24–25. Based on Plaintiffs' expert's calculations,
 23 Whirlpool will potentially payout a maximum of \$13.2 to \$22.5 million in repair costs. *Id.* at ¶ 25.
 24 Plaintiffs' expert also calculated the maximum replacement benefit to be between \$10.3 and \$20.3
 25 million. *Id.* at ¶ 34. Thus, Whirlpool's estimated maximum potential payout, assuming 100%
 26 participation by class members, is \$23.6 to \$42.8 million. *Id.* at ¶ 35. Notably, Plaintiffs' expert
 27 determined the average cost to repair a Frost Clog Issue to be \$272.78, *id.* at ¶ 20, which is less than
 28

1 the available payment under the Settlement for Frost Clog repairs in the first three years of ownership
 2 and exceeds the available payment for Frost Clogs in the next three years by less than 20%.

3 Finally, Angeion Group, the proposed Settlement Administrator, projects a claims rate of 0.5
 4 to 1.5% of the Settlement Class, which consists of approximately 354,000 members. Admin. Decl.
 5 ¶ 50. However, given the estimated repair rate of the Class Refrigerators due to Frost Clog Issues of
 6 13.6% to 22.5%, the projected 1,770 to 5,310 claims would actually represent 2.2% to 11.0% of the
 7 estimated Class Refrigerators impacted by Frost Clog Issues (13.6 to 22.5% of 354,000 or 48,144 to
 8 79,650 Class Refrigerators). Based on these claim rates, Whirlpool could be expected to payout
 9 somewhere between \$519,200 (2.2% of \$23.4 million) and \$4,708,000 (11.0% of \$42.8 million).

10 **C. Class Counsel's Attorney Fees and Expenses and the Settlement Class Representatives' Service Awards.**

11 Plaintiffs' Counsel will petition the Court for an award of attorneys' fees, litigation costs, and
 12 service awards up to a combined total of \$1,160,000.00. The Settlement Class and the Court will have
 13 a full opportunity to consider the appropriate fees as part of the final approval process. There is no
 14 "clear sailing" agreement, and final approval is not contingent upon approval of the requested
 15 attorneys' fees, costs, or service awards. SA at VIII.B, VIII.F. The Settlement Agreement is also non-
 16 reversionary: under no circumstances will Whirlpool receive any of the settlement funds back, even if
 17 the Court does not award the requested fees, litigation costs, and service awards. SA at VIII.G. The
 18 combined requested total will include requested reimbursement for costs associated with the retention
 19 of experts, mediation fees, and all other costs incurred during the Action. The current lodestar, as set
 20 forth in the Joint Counsel Declaration, is approximately \$1,207,863.75. Joint Counsel Decl. ¶ 33. As
 21 Plaintiffs' Counsel intend to request a total of \$1,160,000, there is no multiplier in this matter, or if a
 22 multiplier were calculated, it would be fractional. Plaintiffs' Counsel will submit final figures with
 23 further detail concerning the hours worked at various stages of this Lawsuit in their forthcoming motion
 24 for attorneys' fees and expenses. *Id.* ¶ 34.

25 Under the Settlement, Plaintiffs' Counsel will seek approval of Service Awards of up to, but
 26 not exceeding, \$5,000 for each Settlement Class Representative. SA at VIII.D. Throughout the course
 27 of the Lawsuit and during the Parties' negotiations, the Plaintiffs opened their home to Whirlpool
 28 counsel and technicians to conduct a full day inspection of the refrigerator in their kitchen, collected

1 and produced documents, reviewed and approved the Complaint and other major filings, maintained
 2 contact with Class Counsel, stayed abreast of settlement negotiations and advised on settlement of this
 3 Lawsuit, including rejecting substantial offers of individual settlement in favor of achieving class-wide
 4 resolution of the claims. Joint Counsel Decl. ¶ 32. Paperno Decl. ¶¶ 3–5; Gibbany Decl. ¶¶ 3–5. The
 5 Settlement is not contingent upon approval of the Service Awards to Settlement Class Representatives,
 6 and the Settlement Class and the Court will have a full opportunity to evaluate the request for such
 7 awards as part of the final approval process. SA at VIII.F.

8 **D. The Release Satisfies the Ninth Circuit’s “identical factual predicate” Requirement.**

9 The Settlement Agreement’s Release only covers those claims alleged in the Lawsuit and
 10 claims based on the identical factual predicate underlying the claims alleged in the Lawsuit. The
 11 Released Claims only include those past and future claims that “arise from or relate to any of the
 12 defects, malfunctions, or inadequacies of the Class Refrigerators that are alleged or could have been
 13 alleged in the Lawsuit arising out of or relating to a Frost Clog Issue including without limitation all
 14 claims for out-of-pocket expense, diminution-in-value, benefit-of-the-bargain, cost-of-repair, cost-of-
 15 replacement, statutory, or premium-price damages or restitution” SA at IX.A. The Released Claims
 16 do not include “claims for personal injury or for damage to property other than to the Class Refrigerator
 17 itself.” SA at IX.B. The Releasees include: (i) Whirlpool “together with its predecessors and successors
 18 in interest, parents, subsidiaries, affiliates, and assigns;” (ii) Whirlpool’s “past, present, and future
 19 officers, directors, agents, representatives, servants, employees, attorneys, and insurers;” and (iii) the
 20 “distributors, retailers, suppliers, and other entities who were or are in the chain of design, testing,
 21 manufacture, assembly, distribution, marketing, sale, installation, or servicing of the Class
 22 Refrigerators.” SA at I.GG.

23 In sum, the Released Claims only include claims against Whirlpool and other relevant
 24 nonparties for economic damages and property damage to the Class Refrigerator itself that are based
 25 on the Lawsuit’s same underlying factual predicate—issues with frost buildup and/or cooling failures
 26 in the Class Refrigerators’ refrigeration compartment related to frost buildup on the refrigeration
 27 compartment’s evaporator. Thus, the Settlement’s Released Claims are all based on the complaint’s
 28 identical factual predicate. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir.

1 2006) (“[A] federal court may release not only those claims alleged in the complaint, but also a claim
 2 based on the identical factual predicate as that underlying the claims in the settled class action. A class
 3 settlement may also release factually related claims against parties not named as defendants....”
 4 (citations omitted and alterations adopted)); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010).

5 Furthermore, the Parties know of no other case that will be affected by this Settlement.

6 **E. The Proposed Plan of Allocation**

7 In cases in which a common fund has been created for the benefit of the entire class, parties
 8 develop a “Plan of Allocation” to determine how the settlement administrator should distribute funds
 9 to claimants, varying depending on the number of claims and criteria that apply to each claimant. *See,*
 10 *e.g., In re Apple Inc. Sec. Litig.*, No. 4:19-cv-02033-YGR, 2024 WL 3297079, at *11 (N.D. Cal. June
 11 3, 2024) (defining “Plan of Allocation” as “the plan for allocating the Net Settlement Fund as set forth
 12 in the Notice” and explaining that the “Claims Administrator shall calculate the claims of Authorized
 13 Claimants in accordance with the Plan of Allocation”). As this is not a common fund case, the Parties
 14 did not develop a Plan of Allocation. Instead, the Settlement sets forth clear guidelines as to how much
 15 financial reimbursement each Settlement Class Member is entitled to, based on documented repair and
 16 replacement costs, if they submit a Valid Claim. *See* SA at IV. There is no dollar cap on the amount of
 17 repair and replacement costs available to Settlement Class Members who submit valid claims. *Id.* at X.

18 **F. Proposed Claim Form Process**

19 To receive monetary benefits for Past Frost Clog Issues, Settlement Class Members are required
 20 to submit a claim form. Members will have 180 days from the Notice Date to submit claims online. SA
 21 at IV.E, V.J. Claim forms must include:

22 (1) A valid Class Refrigerator model and serial number combination and documentary proof
 23 that the claimant either purchased a Refrigerator new or acquired it as part of the purchase or remodel
 24 of a home or as a gift. Sufficient documentary proof includes but is not limited to purchase receipts,
 25 credit card statements, and warranty registrations. If no such proof is available, then the claimant shall
 26 provide a claim-form declaration, signed under oath, that the claimant cannot locate sufficient
 27 documentary proof but that the Claimant meets the Settlement Class Definition. SA at IV.A.1.
 28

(3) Documentary proof that the claimant experienced a Paid Qualifying Repair includes, but is not limited to, service tickets, service receipts, cancelled checks, and/or credit card statements. SA at IV.A.2.c. Documentary proof that the claimant actually experienced a Paid Qualifying Replacement, Frost Clog Issues requiring two or more repairs before the Qualifying Replacement, includes, but is not limited to, such as purchase receipts, credit card statements, and/or other documents showing the amount paid out-of-pocket. SA at IV.A.2. e,f.

To receive monetary benefits for Post-Notice Frost Clog Issues, Settlement Class Members are required to contact Whirlpool within 90 days of the Frost Clog Issue to schedule their repairs and provide the same documentary proof outlined in subsections (1) and (2) above. SA at IV.B.

17 Before denying claims because of insufficient documentary proof, the Settlement Administrator
18 shall send, by email and text if available or first-class United States Mail if email and text are not
19 available, a written Notice of Claim Deficiency to the Settlement Class Member identifying the
20 insufficient proof that may cause the claim to be denied and giving the Settlement Class Member no
21 more than 30 days to cure the deficiency. SA at V.D. Moreover, if any Settlement Class Member
22 disputes the Settlement Administrator's denial of a claim for any reason, the Settlement Administrator
23 shall send the claim to Whirlpool and Class Counsel for Whirlpool to determine the claim's validity.
24 Whirlpool's determination shall be final and binding unless Class Counsel, within 30 days of
25 notification of Whirlpool's determination, contests Whirlpool's determination by first attempting to
26 resolve the claim in dispute directly with Whirlpool's counsel and, if those efforts are unsuccessful, by
27 presenting the matter for determination to the Court within 30 days of the completion of Whirlpool's
28 and Class Counsel's conferral. In the case of Whirlpool's denial of a claim for a Post-Notice Frost Clog

1 Issue for any reason, Class Counsel shall have the right to challenge the denial according to the same
 2 procedures above. SA at V.E.

3 Claim forms are being required for this settlement to ensure settlement funds are directed to
 4 individuals who have suffered the Frost Clog Issue and have experienced out-of-pocket expenses
 5 because of the defect, and to prevent diversion of settlement funds to individuals with other concerns
 6 about their refrigerators' performance, or to scammers. The claim forms are designed to be user-
 7 friendly. The first piece of required information is the refrigerator's model number and serial number
 8 to confirm the refrigerator is a Class Refrigerator, consistent with Whirlpool's records. The claim forms
 9 then ask two simple questions and request the documentation or signed declarations outlined above.
 10 SA, Ex. 1 [Replacement Claim Form – Instructions and Past Frost Clog Claim Form - Instructions].
 11 Moreover, the claims process is designed to be manageable and to maximize participation in the
 12 settlement. As stated above, the Angeion Group, the proposed Settlement Administrator, projects a
 13 claims rate of 0.5–1.5% of the Settlement Class, which consists of approximately 354,000 members.
 14 Admin. Decl. ¶ 50. However, as explained above, given the estimated repair rate of the Class
 15 Refrigerators due to Frost Clog Issues of 13.6% to 22.5%, Joint Counsel Decl. ¶ 29, the projected 3,540
 16 claims (1% of 354,000) would actually represent 4.4% to 7.4% of the estimated Class Refrigerators
 17 impacted by Frost Clog Issues (13.6–22.5% of 354,000 or 48,144–79,650 Class Refrigerators).

18 **IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL**

19 Under Rule 23(e)(2), before approving a class action settlement, a district court must conclude
 20 the settlement is “fair, reasonable, and adequate.” *In re Apple Inc. Device Performance Litig.*, 50 F.4th
 21 769, 780 (9th Cir. 2022) (quoting Fed. R. Civ. P. 23(e)(2)). Under Rule 23(e)(2), courts must consider
 22 whether: (1) “the class representatives and class counsel have adequately represented the class”; (2)
 23 “the proposal was negotiated at arm’s length”; (3) “the relief provided for the class is adequate”; and
 24 (4) “the proposal treats class members equitably.” Fed. R. Civ. P. 23(e)(2). Here, because the
 25 Settlement provides fair, reasonable, and adequate relief for all Settlement Class Members, the
 26 Settlement meets Rule 23(e)(2)’s requirements.

27

28

1 **A. Settlement Class Representatives and Plaintiffs' Counsel Have Adequately Represented
2 the Interests of the Settlement Class.**

3 Nancy Paperno and Robert Gibbany do not have any interests antagonistic to the other
4 Settlement Class Members, whose interests they will continue to vigorously protect. Plaintiffs have
5 volunteered to represent the Class and have participated actively in the Action, and they remain
6 committed to vigorously prosecuting this case in the best interests of the Settlement Class. This is
7 evidenced by the fact that after Plaintiffs retained counsel, Whirlpool repeatedly sought to provide them
8 with a new, replacement refrigerator and additional cash to settle their individual claims, and they
9 rejected the offer on each occasion. Their participation easily meets the adequacy requirement. *See*
10 *Trosper v. Styker Corp.*, No. 13-cv-0607-LHK, 2014 WL 4145448, at *12 (N.D. Cal. Aug. 21, 2014)
11 (“All that is necessary is a rudimentary understanding of the present action and ... a demonstrated
12 willingness to assist counsel in the prosecution of the litigation.”) (citation omitted).

13 Further, Plaintiffs have retained proposed class counsel with significant experience prosecuting
14 consumer protection class actions and complex litigation in this District and nationwide. *See* Joint
15 Counsel Decl. ¶¶ 23–26. They devoted the resources necessary to see this case through despite
16 significant risk. *Id.* ¶¶ 31–35. Plaintiffs’ Counsel’s work began 17 months before filing suit and has
17 included selecting appropriate representative plaintiffs, preparing the Complaint, defeating Whirlpool’s
18 motion to dismiss, consulting with experts, evaluating ongoing informal discovery, preparing for and
19 attending mediation (including analyzing documents produced in advance of mediation), evaluating
20 options for settlement benefits that would meet the Settlement Class’s needs, and reaching the proposed
21 Settlement. *Id.* ¶¶ 8–13. They have been guided by the Settlement Class Members’ interests throughout
22 the management of this case and present this Settlement as in their best interests. *Id.* ¶¶ 17–22.

23 **B. The Settlement Agreement Was Negotiated at Arm’s Length.**

24 The Ninth Circuit “put[s] a good deal of stock in the product of an arms-length, non-collusive,
25 negotiated resolution” in approving class action settlements. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d
26 948, 965 (9th Cir. 2009). “Class settlements are presumed fair when they are reached following
27 sufficient discovery and genuine arms-length negotiation.” *Cottle v. Plaid Inc.*, 340 F.R.D. 356, 375
28 (N.D. Cal. 2021) (citation omitted). Plaintiffs undertook a substantial pre-filing investigation before

1 filing the Complaint, including interviewing potential plaintiffs and reviewing materials such as
 2 Whirlpool's TSPs, message board posts, web pages, and marketing materials, as well as articles about
 3 the industry, as well as engaging subject matter consultants to analyze the viability of Plaintiffs' claims.
 4 Joint Counsel Decl. ¶ 9. Plaintiffs acquired a wide range of information about the Class Refrigerators
 5 and their cooling failures, allowing them to reasonably evaluate their claims' strengths and weaknesses
 6 and balance the benefits of settlement against the risks of continued litigation. *Id.* ¶ 4. Plaintiffs'
 7 Counsel also sought and received extensive informal discovery from Whirlpool in preparation of
 8 settlement negotiations. *Id.* ¶ 14. Such discovery included Whirlpool's confidential production of
 9 complaints data, showing that consumers and warranty-service providers began contacting Whirlpool
 10 about the Class Refrigerators' issues with cooling caused by frost and ice build-up as early as 2013,
 11 and further data to help Plaintiffs' expert reasonably estimate the rate at which the Class Refrigerators
 12 experienced such cooling failures. *Id.* And “[i]n the context of class action settlements, as long as the
 13 parties have sufficient information to make an informed decision about settlement, ‘formal discovery
 14 is not a necessary ticket to the bargaining table.’” *Wilson v. Tesla, Inc.*, No. 17-cv-03763-JSC, 2019
 15 WL 2929988, at *8 (N.D. Cal. July 8, 2019) (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234,
 16 1239 (9th Cir. 1998)). Finally, the Parties reached the Settlement under Mr. Hughes' supervision and
 17 based it on Mr. Hughes' mediator's proposal. Joint Counsel Decl. ¶ 15. The Settlement thus resulted
 18 from serious, informed, and non-collusive negotiations. *See In re Tableware Antitrust Litig.*, 484 F.
 19 Supp. 2d 1078, 1079–80 (N.D. Cal. 2007).

20 **1. The Settlement Also Satisfies the *Bluetooth* Factors.**

21 Further, pre- and post-class certification, courts must “scrutinize agreements for ‘subtle signs
 22 that class counsel have allowed pursuit of their own self-interests … to infect the negotiations.’”
 23 *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods.*
 24 *Liab. Litig.* (“*Bluetooth*”), 654 F.3d 935, 947 (9th Cir. 2011)). The three *Bluetooth* factors are: (1)
 25 “when counsel receive a disproportionate distribution of the settlement, or when the class receives no
 26 monetary distribution but class counsel are amply rewarded”; (2) when the payment of attorneys’ fees
 27 is “separate and apart from class funds”; and (3) when the parties arrange for benefits that are not
 28

1 awarded to revert to the defendants rather than being added to the class fund. *Bluetooth*, 654 F.3d at
 2 947. Here, the *Bluetooth* factors further support granting preliminary approval.

3 The first *Bluetooth* factor is not present here. All class members will receive the benefit of an
 4 extended service plan. Plaintiffs' expert has valued this extended service plan at \$153.08 per Class
 5 Refrigerator, representing an appropriate portion of the estimated market cost of a full seven-year
 6 extended (in addition to the one-year original warranty) service plan. Bernatowicz Decl. at ¶¶ 14–15.
 7 Plaintiffs' expert valued the extended service plan for the entire class at \$55.5 million. As for the value
 8 of the claims made for reimbursement of out-of-pocket repair and replacement costs, with an estimated
 9 claims rate of 1%, it is anticipated that Settlement Class Members will receive between \$1.03 million
 10 at the low end (4.4% of \$23.4 million) and \$3.16 million at the high end (7.4% of \$42.8 million). The
 11 claims rate may well exceed that value, as the Settlement provides for direct notice and publication
 12 notice to Settlement Class Members. *See infra* Section VI.A.

13 As for fees, Plaintiffs' Counsel intend to request fees, costs, and service awards in the amount
 14 of \$1,160,000. Joint Counsel Decl. ¶ 31. Based on the settlement benefits detailed above, if Plaintiffs'
 15 Counsel is awarded this full amount, they will not receive a disproportionate share of the Settlement.
 16 The second *Bluetooth* factor also takes into account "clear sailing agreements" in which a defendant
 17 agrees not to challenge agreed-upon fees for class counsel. *See Briseño*, 998 F.3d at 1026–27 ("A clear
 18 sailing provision signals the potential that a defendant agreed to pay class counsel excessive fees in
 19 exchange for counsel accepting a lower amount for the class members."). No such agreement exists
 20 here, and final approval is not contingent upon approval of the requested fees, costs and expenses. SA
 21 at VIII.B, VIII.F. The third factor is also not present because fees not awarded will not revert to
 22 Whirlpool; instead, they will be awarded to a *cy pres* recipient. SA at VIII.G.

23 **C. The Relief Offered in the Settlement Is More Than Adequate.**

24 The Settlement is valuable. The Settlement Agreement's terms essentially constitute an eight-
 25 year extended service plan⁸ to repair Frost Clog Issues, which Plaintiffs' expert valued at \$54.1 million
 26 for the Settlement Class. Bernatowicz Decl. at ¶¶ 12–19. Alternatively, Whirlpool's maximum
 27 potential payout under the Settlement Agreement for repair and replacement costs is \$23.6 to \$42.8

28 ⁸ The settlement extends repair benefits from one year (the present warranty) to eight years.

1 million. *Id.* at ¶¶ 20–35. As explained above, *see supra* Section III.B, based on Angeion Group’s
 2 projected claims rate of 0.5 to 1.5%, which represents 2.2% to 11.0% of the estimated Class
 3 Refrigerators impacted by Frost Clog Issues, Whirlpool could be expected to payout somewhere
 4 between \$519,200 (2.2% of \$23.4 million) and \$4,708,000 (11.0% of \$42.8 million).

5 The Settlement relief also compares very favorably to other consumer appliance settlements.
 6 *See Case Comparison Chart, Joint Counsel Decl., Ex. B* (comparing the Class Settlement to settlement
 7 terms in: *Cleveland v. Whirlpool Corp.*, No. 0:20-cv-01906-WMM-KMM (D. Minn. June 23, 2022)
 8 ECF No. 89; *Corzine v. Whirlpool Corp.*, No. 15-cv-05764 (N.D. Cal. Dec. 31, 2019), ECF No. 134;
 9 and *Chambers v. Whirlpool Corp.* No. 8:11-cv-01733-FMO-JCG (C.D. Cal. Nov. 15, 2021), ECF No.
 10 418); *see also* Joint Counsel Decl. ¶ 30. While these three other settlements offered similar relief to
 11 consumers—reimbursement for repairs or replacement of their appliances, this Settlement the same or
 12 better cash relief for repair or replacement. *See id.*

13 1. The Strengths and Risks of Plaintiffs’ Claims

14 Plaintiffs believe their claims are meritorious, and their claims’ strength is a critical factor that
 15 drove negotiations and the proposed Settlement Agreement. Nevertheless, Plaintiffs face substantial
 16 risks that could decrease the amount of recovery—or even defeat recovery on a class-wide basis.⁹

17 First, although Plaintiffs believe a class would be certified for at least some, if not all, of their
 18 claims, Plaintiffs recognize the significant risk of an adverse class certification ruling by this Court, the
 19 Ninth Circuit, or the Supreme Court. For certain claims, Whirlpool might successfully argue that
 20 individualized issues would predominate. Further, throughout the Lawsuit, Whirlpool has contended
 21 Plaintiffs’ defect theory is mistaken and that the absence of a defrost heater on Settlement Class
 22 Representatives’ refrigerator did not cause their refrigerator’s Frost Clog Issues. Joint Counsel Decl.
 23 ¶ 4. Should the Action continue, there is a risk discovery will not support Plaintiffs’ defect theory or
 24 that this Court, or an appellate court, could disagree that the evidence supports Plaintiffs’ defect theory.
 25 Varying causes for the Frost Clog Issues could defeat class certification. *See In re Arris Cable Modem*

26 ⁹ Plaintiffs do not analyze punitive damages at this stage, even though some claims allow for them.
 27 Plaintiffs would not argue against imposing punitive damages. Rather, punitive damages are inherently
 28 unpredictable and discretionary; as such, they typically play a limited role in determining the fairness
 of a settlement. *See In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL
 No. 2672 CRB (JSC), 2017 WL 2212783, at *24 (N.D. Cal. May 17, 2017).

1 *Consumer Litig.*, 327 F.R.D. 334, 365 (N.D. Cal. 2018) (explaining, in the context of UCL and CLRA
 2 claims, that if “there is a mismatch between the alleged defects and the alleged misrepresentations,”
 3 then “Plaintiffs’ claims would fail on a class-wide basis”). And even if Plaintiffs successfully certified
 4 one or more classes, there would be a risk that the Court could later decertify the class. *See In re Netflix*
 5 *Priv. Litig.*, No. 5:11-cv-00379 EJD, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) (“The notion
 6 that a district court could decertify a class at any time is one that weighs in favor of settlement.”).

7 Second, in addition to the claim-specific risks described below, some damages may be
 8 duplicative. While contrary arguments exist, Whirlpool could argue damages for the consumer
 9 protection claims and the breach of implied warranty claims compensate Plaintiffs for the same injuries
 10 sustained from owning a Class Refrigerator. If that argument succeeds, damages on the claims may not
 11 be stacked on top of each other. *See, e.g., Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017,
 12 1032 (9th Cir. 1999) (“[A] plaintiff may not receive multiple awards for the same item of damage.”).

13 **a. Comparing the Strengths and Risks of the Implied Warranty Claims.**

14 Plaintiffs bring two breach of implied warranty claims—under the Song-Beverly Consumer
 15 Warranty Act and under the California Commercial Code and California common law—based on
 16 Whirlpool impliedly warranting to Plaintiffs and Settlement Class Members that the Class Refrigerators
 17 were of merchantable quality and fit for their ordinary purpose. Compl. ¶¶ 96–127. Under the Song-
 18 Beverly Act and the California Commercial Code, there is an implied warranty of merchantability that
 19 consumer goods “[a]re fit for the ordinary purposes for which such goods are used.” Cal. Civ. Code
 20 § 1791.1(a)(2); Cal. Com. Code § 2314(2)(c). In support of these claims, and given the Class
 21 Refrigerators’ widespread documented cooling issues, Plaintiffs believe they could prove the Class
 22 Refrigerators were unfit for their ordinary purpose of chilling food.

23 Conversely, there remain significant risks in continuing to litigate these claims. With respect to
 24 Whirlpool’s argument that the implied warranty claims are untimely, Plaintiffs alleged that Whirlpool’s
 25 fraudulent concealment tolled the statute of limitations. Compl. ¶¶ 74–85. Should this Action continue,
 26 discovery will reveal the extent to which Whirlpool’s deception tolls the statute of limitations. Such
 27 discovery could help or hinder these claims. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F.
 28 Supp. 2d 1011, 1024 (N.D. Cal. 2010) (fraudulent concealment is fact-intensive and, for that reason,

1 requires an opportunity for discovery for plaintiffs to produce evidence of fraudulent concealment).
 2 Second, the Song-Beverly Act provides for a one-year implied warranty of merchantability. Cal. Civ.
 3 Code § 1791.1(c). Settlement Class Representatives alleged that their refrigerator began to experience
 4 cooling failures 22 months after they bought it. Compl. ¶¶ 49, 52. As a result, this Court, or an appellate
 5 court, could rule at a later juncture that the implied warranty period expired. The benefit Settlement
 6 Class Members would receive under the Settlement appropriately accounts for the risks associated with
 7 continuing to litigate Plaintiffs' implied warranty claims.

b. Comparing the Strengths and Risks of the Consumer Protection Claims.

Plaintiffs also bring two consumer protection claims alleging Whirlpool engaged in unfair and deceptive acts and practices in violation of California's CLRA and California's UCL in connection with the marketing and sale of the Class Refrigerators that Whirlpool knew were prone to cooling failures. Compl. ¶¶ 128–70. In its order denying the motion to dismiss, the Court ruled the Complaint alleged Whirlpool's pre-sale knowledge based on the consumer complaints and the TSPs, together were "sufficient to support an inference that Whirlpool knew that the refrigerators had a persistent problem with frost and ice build-up on the evaporators before the sale to the plaintiffs." ECF No. 49 at 4. Like implied warranty claims, these claims' success may turn on the discovery received and Plaintiffs' ability to prove Whirlpool's pre-sale knowledge.

2. Further Litigation Would Be Expensive, Complex, and Lengthy.

Continuing this Action would be expensive, complex, uncertain, and lengthy. And "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 A Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed. 2002). First, there is the risk of not prevailing on class certification. Plaintiffs believe they can satisfy all the requirements of Rule 23 to certify a class of persons who purchased the refrigerators, but Whirlpool asserts the cooling issues Plaintiffs and the putative class experienced can arise from multiple potential causes, which could potentially defeat commonality and predominance. Plaintiffs' expert would also need to conduct a costly conjoint analysis to measure consumers' preferences for a refrigerator without the Frost Clog Issue and demonstrate that class-wide damages can be calculated. Second, there is the risk of receiving unfavorable rulings at summary judgment or an adverse jury

1 verdict at trial. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 664 (S.D.N.Y. 2015)
 2 (approving settlement and noting verdict could depend on factors like “the persuasiveness of each
 3 side’s expert witnesses” and “the justifications advanced by” the defendant for its practices). Indeed,
 4 explaining the Class Refrigerators’ complex mechanics and the number of issues involved would make
 5 presenting the case to the trier of fact and proving damages on a class-wide basis challenging, and it is
 6 possible a jury might not reach a unanimous verdict on all issues. While Plaintiffs believe they can
 7 present a compelling case to a jury, a wide range of potential outcomes exist. Finally, even if Plaintiffs
 8 obtained a favorable verdict, Whirlpool would still have arguments for overturning the verdict.

9 Resolving the action at this time saves the Parties the uncertainty and expense of additional
 10 litigation and substantially benefits the Class by providing a recovery that is certain and immediate,
 11 without having to face the risks inherent with protracted litigation. Nearly all class action settlements
 12 reflect tradeoffs and difficult choices. Here, the total value of the benefits under the proposed
 13 Settlement Agreement appropriately accounts for the risks of further litigation.

14 **D. The Settlement Treats Settlement Class Members Equitably.**

15 The Settlement provides equal access to financial reimbursement for all Settlement Class
 16 Members who timely submit Valid Claims. Each Settlement Class Member’s monetary benefit will
 17 correspond to proof of prior out-of-pocket repair and/or replacement costs, with those who incurred
 18 greater costs receiving greater reimbursement. The Settlement treats Class Members equitably.

19 **V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

20 **A. The Settlement Class Satisfies the Rule 23(a) Prerequisites.¹⁰**

21 **1. The Class is Sufficiently Numerous.**

22 First, a putative class must be “so numerous that joinder of all members is impracticable.” Fed.
 23 R. Civ. P. 23(a)(1). Numerosity is generally satisfied when the class exceeds forty members. *See, e.g.*,
 24 *Lagunas v. Young Adult Inst., Inc.*, No. 23-cv-00654-RS, 2024 WL 1025121, at *3 (N.D. Cal. Mar. 8,
 25 2024) (class of 299 employees); *del Campo v. Am. Corrective Counseling Servs., Inc.*, 254 F.R.D. 585,
 26 592 (N.D. Cal. 2008) (noting a class of 1,000 members clearly satisfies numerosity). The class here is
 27 made up of an estimated 354,000 individuals. Joint Counsel Decl. ¶ 18.

28 ¹⁰ Rule 23(a)’s prerequisite of adequacy of representation is addressed above. *See supra* Section IV.A.
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1 **2. There Are Common Questions of Law and of Fact.**

2 Second, commonality requires that the action involve “questions of law or fact common to the
 3 class.” Fed. R. Civ. P. 23(a)(2). “So long as there is ‘even a single common question,’ a would-be class
 4 can satisfy the commonality requirement.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th
 5 Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes* (“*Wal-Mart*”), 564 U.S. 338, 359 (2011)). Where
 6 claims “derive from a common core of salient facts, and share many common legal issues,”
 7 commonality is met. *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006). This action
 8 presents many common legal and factual questions that are subject to class-wide resolution.¹¹ All
 9 members of the potential class derive their claims from the same circumstances. They each purchased
 10 a Class Refrigerator that contained the same flawed design. Whirlpool’s conduct—manufacturing these
 11 refrigerators and continuing to market and sell them, despite knowing that frost or ice routinely forms
 12 on the refrigeration compartment evaporator for these models—is identical for and forms the basis of
 13 each Settlement Class Member’s claim. This uniform conduct raises common questions, resolution of
 14 which will generate common answers “apt to drive the resolution of the litigation” for the Class as a
 15 whole. *Wal-Mart*, 564 U.S. at 350. These facts more than suffice to meet the commonality requirement.

16 **3. The Settlement Class Representatives’ Claims are Typical of Settlement Class
 17 Members’ Claims.**

18 Third, Settlement Class Representatives’ claims must be typical of the claims of the proposed
 19 class. Fed. R. Civ. P. 23(a)(3). “The test for typicality is whether other members have the same or
 20 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
 21 whether other class members have been injured by the same course of conduct.” *Sandoval v. Cnty. of
 22 Sonoma*, 912 F.3d 509, 518 (9th Cir. 2018) (citation omitted). Here, Plaintiffs suffered the same injury
 23 as the other putative class members, and their refrigerator was plagued by the same issues as the other
 24 Class Refrigerators. Settlement Class Members’ refrigerators experienced analogous problems with
 25 frost and ice build-up on the refrigeration compartment’s evaporator, as shown by the thousands of
 26 consumer complaints Whirlpool has received about this problem. Nothing about Whirlpool’s conduct
 27 is unique to Plaintiffs. As stated above, Whirlpool’s conduct across the board impacted Plaintiffs and

28 ¹¹ See Compl. ¶ 90 (identifying five common questions of law and fact).

1 Settlement Class Members in the same way. Because Plaintiffs' allegations involve the "same course
 2 of conduct," which is "not unique to the named plaintiffs," typicality is satisfied here. *Valliere v. Tesoro*
 3 *Ref. & Mktg. Co. LLC*, No. 17-cv-00123-JST, 2020 WL 13505042, at *5 (N.D. Cal. June 26, 2020).

4 **B. The Settlement Class Satisfies Rule 23(b)(3)**

5 Rule 23(b)(3)'s predominance and superiority requirements are satisfied here.

6 **1. Common Issues of Law and Fact Predominate**

7 Rule 23(b)(3)'s predominance inquiry focuses on whether the "common questions present a
 8 significant aspect of the case and ... can be resolved for all members of the class in a single
 9 adjudication." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citation omitted). Even
 10 if just one common question predominates, "the action may be considered proper under Rule 23(b)(3)
 11 even though other important matters will have to be tried separately." *Tyson Foods, Inc. v. Bouaphakeo*,
 12 577 U.S. 442, 453 (2016). Questions common to class members predominate over any questions
 13 affecting only individual members. Whirlpool's same conduct forms the basis for Plaintiffs' breach of
 14 implied warranty and California consumer protection law claims. The Settlement Class satisfies the
 15 predominance requirement through common, generalized proof for each of these four claims. Should
 16 Plaintiffs try this case before a jury, Plaintiffs would prove, among other things, that: (1) the Class
 17 Refrigerators all lack a defrost heater accompanying the refrigeration compartment's evaporator; (2)
 18 this design causes the Class Refrigerators to periodically fail; and (3) Whirlpool knew the Class
 19 Refrigerators were susceptible to periodic cooling failures and continued to manufacture, market,
 20 distribute, and sell the Class Refrigerators to unwitting consumers. Each Settlement Class Member
 21 suffered the same conduct—being sold a defective refrigerator manufactured by Whirlpool. The facts
 22 supporting each Settlement Class Member's claims will be uniform as Whirlpool's conduct was
 23 consistent for the entire Settlement Class. Some individual damage calculations may be necessary,
 24 depending on factors such as when the Settlement Class Member purchased their refrigerator, how
 25 often it failed, and what repairs Whirlpool provided, but when possible individualized questions relate
 26 to damages and not liability, common issues to the class may still predominate and certification is
 27 appropriate. See *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019) ("[T]he
 28 need for individual damages calculations does not, alone, defeat class certification.") (citation omitted).

1 **2. Class Treatment is Superior**

2 Rule 23(b)(3)'s superiority element requires a district court to determine "whether the
 3 objectives of the particular class action procedure will be achieved in the particular case," which
 4 "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution."
 5 *Hanlon*, 150 F.3d at 1023. The sheer number of potential separate trials, were they to be pursued, also
 6 favors certification. Absent the class action device, Settlement Class Members would need to
 7 individually prosecute their own separate actions, which would burden courts, require the repeated
 8 adjudications of the same legal issues, thereby creating a potential for inconsistent or contradictory
 9 judgments, and would be prohibitively costly for individual litigants. *See Phillips Petroleum Co. v.*
 10 *Shutts*, 472 U.S. 797, 809 (1985) ("Class actions ... permit the plaintiffs to pool claims which would
 11 be uneconomical to litigate individually"). By contrast, class actions present far fewer management
 12 difficulties and provide the benefits of single adjudication, economy of scale, and comprehensive
 13 supervision by a single court. The superiority of class treatment is met here.

14 **VI. THE PROPOSED SETTLEMENT ADMINISTRATOR, NOTICE PROGRAM, AND
 15 PROCESS FOR OPT-OUTS AND OBJECTIONS SHOULD BE APPROVED**

16 **A. The Settlement Administrator**

17 **1. The Parties Propose Appointing Angeion Group as Settlement Administrator.**

18 The Parties propose appointing the Angeion Group as the Settlement Administrator. They do
 19 so after evaluating the bids from three prospective settlement administrators. Joint Counsel Decl. ¶ 37.
 20 The Parties selected Angeion Group based on the specificity of the Notice proposal, including the
 21 digital media campaign, the cost, and Angeion Group's past experience administering similar consumer
 22 settlements. Collectively, Plaintiffs' Counsel have used Angeion Group as a settlement administrator
 23 on one occasion in the past two years. Angeion Group advised the total estimated cost of notice and
 24 administration will be \$191,752 over 24 months, which Whirlpool will pay. The estimated costs are
 25 reasonable compared to the Settlement's value and the Settlement Class size.

26 **2. The Settlement Administrator's Estimated Claims Rate**

27 Estimating a claims rate is complex. Angeion Group has estimated that there will be a 0.5–15%
 28 claims rate in this matter (or 1,770 to 5,310 claims) based on its experience in other consumer appliance

1 cases. Admin. Decl. ¶ 50. The Notice Plan proposed here is intended to maximize the claims rate and
 2 encourage Settlement Class member participation. *Id.* ¶¶ 54–57.

3 **B. The Proposed Notice Plan**

4 Consistent with this District’s *Procedural Guidance for Class Action Settlements*, the proposed
 5 notice plan is the best notice practicable under the circumstances and provides individual notice to all
 6 Class Members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). The notice
 7 plan was designed in consultation with the proposed Settlement Administrator and incorporates direct
 8 notice via email to all valid email addresses known to Whirlpool or by text to phone numbers known
 9 to Whirlpool. SA at V.H. The Settlement Administrator will utilize a reverse look-up service to obtain
 10 additional email addresses and mobile phone numbers for Settlement Class Members for whom
 11 Whirlpool has only a physical address, or whose email and text notice bounce back from an
 12 undeliverable address or invalid or non-mobile phone number. *Id.* The Settlement Administrator will
 13 mail a Summary Notice to each Settlement Class Member for whom an address can be found in
 14 Whirlpool’s databases but who does not have an identifiable email address or mobile phone number.
 15 *Id.* The Settlement Administrator will perform a national change of address search and forward notice
 16 packages returned by the U.S. Postal Service with a forwarding address. *Id.*

17 The long form Notice and Summary Notice contain all required information, including how to
 18 object or opt out, when to object or opt out, and the date set for the final approval hearing. The Notices
 19 are drafted in clear, accessible language, and in a format that satisfies due process. SA, Exs. 3; 5; 6.

20 In addition, the Settlement Administrator will provide publication notice to the Settlement Class
 21 using appropriate media outlets, including social media outlets. SA at V.I. Angeion Group, the
 22 proposed Settlement Administrator, proposes using display ads, paid social media ads (Facebook and
 23 Instagram), and search engine marketing and projects its recommended media plan will deliver a
 24 70.01% reach of the Class Members. Admin. Decl. ¶ 55. The Settlement Administrator will also create
 25 a Settlement Website with all necessary and pertinent information for Settlement Class Members,
 26 including the Claim Form, the FAQ, and information relating to relevant deadlines. The Website will
 27 also permit submitting claims online, including uploading any necessary documentation. SA at V.J.
 28

1 The proposed notice plan meets or exceeds California's and federal law's requirements,
2 satisfies due process, and provides several means for Class Members to participate in the Settlement.
3 Therefore, Settling Parties respectfully request that the Court approve the Notice Plan provided in the
4 Settlement and order distribution of the proposed Notice as set forth in the Settlement Agreement.

5 C. Opt-Outs and Objections

Any Class Member shall have the right to be excluded from the Settlement by providing a written request postmarked no later than 91 days following the entry of the Preliminary Approval Order. The notices (discussed above) shall provide instructions to Class Members who wish to exclude themselves from the Settlement Class and set forth the deadline to do so. SA at VII.A. The Settlement Administrator shall assign a unique identifier to each properly-submitted Request for Exclusion and report the excluded Class Members to the Court. *Id.* Additionally, any Class Member who wishes to oppose the reasonableness and fairness of the Settlement at the Fairness Hearing must file with the Court a written objection stating the basis of the objection and the objection must also be served on Class Counsel and counsel for Whirlpool by the stated deadline. SA at VII.D. The notices (discussed above) will provide instructions for Class Members to properly submit objections and set forth all required information and the deadline to do so. *Id.* The notices will also specify that the requirement to file a written objection may be excused upon a showing of good cause and that the Court will require only substantial compliance with the requirements for submitting an objection. *Id.*

VII. CONCLUSION

The Settlement is substantial and fair and would provide immediate reimbursement relief for those who have incurred documented costs for Paid Qualifying Repairs and/or Paid Qualifying Replacements. For the three-door Class Refrigerator models, it achieves the Action's goal, benefits the entire Settlement Class, and accounts for the risks and uncertainties of continued, vigorously contested litigation. Plaintiffs respectfully request the Court preliminarily approve the Settlement, certify the Settlement Class, appoint the undersigned as Class Counsel and Nancy Paperno and Robert Gibbany as Settlement Class Representatives, order dissemination of Class Notice to Settlement Class Members in accordance with the proposed Notice Plan, and set a date for the Final Approval Hearing.

1 Dated: October 30, 2024

Respectfully Submitted,

2 By: s/ Laura R. Gerber

3 Laura R. Gerber (*Pro Hac Vice*)
4 Michael Woerner (*Pro Hac Vice*)
5 Andrew N. Lindsay (*Pro Hac Vice*)
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3400
Seattle, Washington 98101
(206) 623-1900
lgerber@kellerrohrback.com
mwoerner@kellerrohrback.com
alindsay@kellerrohrback.com

9 Alison E. Chase (SBN 226976)
10 KELLER ROHRBACK L.L.P.
11 801 Garden Street, Suite 301
12 Santa Barbara, California 93101
(805) 456-1496
achase@kellerrohrback.com

13 Michael J. Brickman (*Pro Hac Vice*)
14 James C. Bradley (*Pro Hac Vice*)
15 Nina Fields Britt (*Pro Hac Vice*)
16 Caleb M. Hodge (*Pro Hac Vice*)
ROGERS, PATRICK, WESTBROOK &
BRICKMAN, LLC
17 1037 Chuck Dawley Blvd., Bldg. A
Post Office Box 1007
18 Mount Pleasant, South Carolina 29465
(843) 727-6500
19 mbrickman@rpwb.com
jbradley@rpwb.com
nfields@rpwb.com
chodge@rpwb.com

22 Kenneth Behrman (*Pro Hac Vice*)
BEHRMAN LAW
23 5855 Sandy Springs Circle, Suite 300
24 Atlanta, Georgia 30328
(770) 952-7770
25 ken.behrman@behrmanlaw.com

26 ***Attorneys for Plaintiffs and the Putative Class***

PROPOSED FINAL APPROVAL HEARING SCHEDULE

Plaintiffs' [Proposed] Order granting Preliminary Approval of Class Action Settlement, filed herewith, includes the following proposed schedule for the approval process:

EVENT	PROPOSED TIME FOR COMPLIANCE
Whirlpool shall serve or cause to be served the notice required by the Class Action Fairness Act, 28 U.S.C.	10 days following the filing of the Motion for Preliminary Approval
Settlement Administrator shall mail, email, and/or text the Summary Notice.	42 days following the Preliminary Approval Order
Settlement Administrator shall publish the Publication Notice.	49 days following the Preliminary Approval Order
Class Counsel shall file their Fee Petition, which shall also be posted on the Settlement Website.	56 days following the Preliminary Approval Order
Settlement Administrator shall file with the Court a declaration of compliance with the notice requirements, including a statement of the number of persons to whom the Summary Notice was emailed, texted, and mailed.	63 days following the Preliminary Approval Order
Objection Deadline: Any objectors shall file objections, together with all supporting memoranda and other material, with the Court, and serve that filing on Class Counsel and counsel for Whirlpool. This includes objections to: certification of the Settlement Class, the designation of Plaintiffs as Class Representatives, the appointment of Class Counsel, the Settlement, the Agreement, and Class Counsel's Fee Petition.	91 days following the Preliminary Approval Order
Opt-Out Deadline: Requests by Class Members to be excluded from the Settlement must be either postmarked by the U.S. Postal Service (in the case of mailed exclusions) or actually received by the Settlement Administrator (in the case of electronically submitted exclusions).	91 days following the Preliminary Approval Order
Any Person or attorney seeking to appear at the Fairness Hearing must file with the Court and serve on Class Counsel and counsel for Defendant an entry of appearance in the consolidated Lawsuit and notice of intention to appear at the Fairness Hearing. This includes any person objecting to any or all of the certification of the Settlement Class, designation of Plaintiffs as Class Representatives, appointment of Class Counsel, the Settlement, the Agreement, or Class Counsel's Fee Application.	91 days following the Preliminary Approval Order
Settlement Administrator must file a list of all exclusions with the Court.	105 days following the Preliminary Approval Order

1	Class Counsel shall file their reply, if any, in support of their Fee Application.	105 days following the Preliminary Approval Order
2	Class Counsel shall file the proposed Final Approval Order and memorandum in support of Final Approval. Whirlpool may separately file a memorandum in support of Final Approval by this deadline.	105 days following the Preliminary Approval Order
3	The Parties shall file their responses, if any, to any objections to certification of the Settlement Class, the designation of Plaintiffs as Class Representatives, the appointment of Class Counsel, the Settlement, the Agreement, and Class Counsel's Fee Petition.	105 days following the Preliminary Approval Order
4	Class Counsel shall file their reply, if any, in support of Final Approval	126 days following the Preliminary Approval Order
5	The Court, at its convenience, will hold the Fairness Hearing.	140 days following the Preliminary Approval Order
6	Claims Deadline: All claims by Settlement Class Members to the Settlement Administrator for benefits shall be postmarked by the U.S. Postal Service (in the case of mailed Claim Forms) or received (in the case of electronic Claim Forms).	180 days following the Preliminary Approval Order
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